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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Lawrence J. Mitchell, Kay Mitchell, Matthew C. Bishop, Tracy Kilgore, Jennifer K. Zeleny, Joseph W. Steele V, Scott Westin, Bruce Bird, Nathan Ornellas, Anu Sood, Brent Miller, Nicholas Beach, Alex Inskeep, Loretta Grady, Richard Fountain, Matthew Gragg, Akoya Lawani, Sharon Williams, Ken Gregory, Sbeen Ajmal, David Self, Edward Dowdy, April Thomas, Don Black, Reza Kamali, Anthony Baquero, Carina Rhea, Shanell Golden, Kim Weston, Adam Brandt, Jacci Brandt, Jennifer King, Ralph McCoy, Aaron Hands, Ayana Smith, Lisa Stern, Mbegane Diouf, Doug Waters, Candyce Ravenell, Paul Fos, Patricia Burkhalter, Blake Knight, Cameron Casey, Jeffery Taylor, Robert Moyer, Marcia Cameron, Gloria Pledger, Charles Jones, Aaron Brodie, Dominique Evans, Richard Farr, Kevin Saliva, Harold Beard, Travis Ashby, Andrew Gorayeb, Scott Mugrage, Edwin Zorilla, Curtis Dowdle, Edward Klann, Steven Stetzel, Glenn Gilleshammer, Wenoka Thompson, Maryann Aldous, Jennifer Porter, Robin Quigg, Tamar Hodges, Barbara Shadoan, Austin Law, Jennifer Ellsworth, Michelle Sterling, Denise Poe, Jamal Dean, Brandon Westman, Concepcion Powell, Adrian Thompson, Eric Talaska, Zachary Christensen, Erica Jones, Stephen Hope, Nedelka Martinsen *et al* and unknown	**PLAINTIFFS' OBJECTION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION AND MEMORANDUM IN SUPPORT OF PLAINTIFFS' OBJECTION** Case No. 2:16-cv-00966 Judge Clark Waddoups

Plaintiffs 1-1,000,000, Plaintiffs, v. Wells Fargo Bank, National Association, a National Banking Association, and Wells Fargo & Company, a Delaware Corporation, and Does 1-5,300, Defendants.	

Plaintiffs, by and through their attorneys, Christensen Young & Associates, PLLC, hereby respectfully submit this Objection to Defendants' Motion to Compel Arbitration, and request to stay litigation proceedings, pending receipt of sufficient information by Wells Fargo of 22 named plaintiffs' information to confirm their identity. In support of their objection to Wells Fargo's Motion, Plaintiffs' submit the accompanying Memorandum in Support of Plaintiffs' Objection.

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INTRODUCTION

Simply put, Wells Fargo's Consumer Account Agreements (CAA) either intended the CAA to cover their illegal actions in this case, which would void the contract on numerous grounds; or the CAA did not intend to cover the illegal actions, in which case the CAA does not govern. In either scenario the arbitration provision in the CAA does not extend to cover the illegal, fraudulent actions of Wells Fargo in the present case. Even if a valid arbitration agreement exists despite numerous formation defenses, and the agreement intended to cover these actions, the court should still deny the motion for other reasons.

Defendants do not waste any time in taking statements out of context in their opening comments regarding "Precise Relief Sought and Specific Grounds for Relief." Defendants direct the Court's attention to paragraph 137 of the second amended complaint (SAC), as evidence that Plaintiffs agree to be bound by the arbitration clause for "any" disputes between the parties.

Likewise, there is no mention in the brief of the admissions made by Wells Fargo's CEO, John Stumpf, and numerous other Wells Fargo officials which have included, but are not limited to: (1) Wells Fargo **admitted** in sworn testimony that it broke the law, and that it stole consumers' money; (2) Wells Fargo admitts it opened over one and one-half million fraudulent accounts without authorization, including over 500,000 credit cards (identity theft); (3) that Wells Fargo fired over 5,000 employees for ostensibly participating in the fraudulent account activities over a five year period of time; (4) that Wells Fargo never reported, or disclosed to federal agencies, or mandatory quarterly and annual regulatory filings, any of the identity theft over a five year period, illegal reporting to credit reporting agencies of victims of identity theft, charging illegal fees, sending fraudulent accounts to collections, and numerous other violations. Nor was it mentioned that CEO Stumpf, and his replacement Sloan, repeatedly stated

verbally, and in writing, that "we are going to make everything right." Exhibit A Stumpf Testimony

The majority of cases cited by Defendants to compel arbitration deal with contract issues, which in turn discuss arbitration clauses. For example, in the *Island Peak Ranch, LLC, v. FIIK Inv. & Holdings, Inc*., 2008 WL 2673925 (hereafter *Island Peak*) and the other cases are easily distinguishable as they did not have admitted, criminal activity and identity theft issues, (confessed to in Congressional Hearings by Wells Fargo's, CEO), which removes the breached agreement from arbitration rules, and allows the Plaintiffs to move forward in a class action status. The crux of the issue is the *reason* that the Wells Fargo CAA arbitration clause is not applicable to the current proceedings. It has nothing to do with notice of the arbitration clause, or whether or not each Plaintiff signed the CAA. The issue is that the FAA specifically provides relief outside of the Act for illegal conduct. The actions engaged in by Wells Fargo had nothing to do with "participation in transactions involving interstate commerce," as set forth in Wells Fargo's arbitration definition. The arbitration clause is not applicable because of the fraudulent, criminal activities engaged in by Wells Fargo, which constitutes a breach of contract, and removes, *in toto,* the arbitration clause.

When Congress engaged in evidentiary hearings with Wells Fargo employees regarding the fraudulent opening of over two million (2,000,000) fraudulent accounts, and the termination of over five thousand three hundred (5,300) Wells Fargo employees for engaging in fraudulent activities, identity theft, and other illegal conduct, it was obsessed with the arrogance demonstrated by Wells Fargo. A financial institution deemed "too big to fail," was now exhibiting conduct of being too big to regulate, or be held accountable for their illegal

activities. As noted by several Congressional members, it was easier for Wells Fargo to break the law, and if the illegal activity was ever discovered, pay a pittance of a penalty compared to the gains they had received by intentionally breaking banking regulations, stealing people's identities, having people lose their homes, driving people's credit scores down, charging illegal fees to customers, and then turning around and sending those customers to collection agencies. The list is unbelievable, but unfortunately for those unlucky customers who have had a mortgage with Wells Fargo, or been in the military and had vehicles unlawfully repossessed, or had unauthorized life insurance taken out on their lives, *etc*., it is a fact of life.

Congress requested Wells Fargo to allow its customers to have their day in court. Wells Fargo's response was essentially "No, our customers signed an arbitration agreement, or failed to close their accounts, so we will compel arbitration." Congress reiterated its request asking Wells Fargo to allow the litigation to move forward in the light of day, and not in the shadows of millions of individual cases of arbitration, where, according to the CAA if "the party that does not agree to submit to arbitration after a lawful demand must pay all of the other party's costs and expenses for compelling arbitration."

As a direct result of Wells Fargo's refusal to consent to Congressional requests, Senator Sherrod Brown and Representative Brad Sherman have introduced identical "Justice For Victims of Fraud Act 2016" bills into the United States Senate and United States House of Representatives. Furthermore, these bills specifically mention the Wells Fargo scandal, and mention this case specifically within their respective bills. *See* Exhibit B, Senate Bill 3491, House Bill 6423, *Justice for Victims of Fraud Act 2016*.

On the other hand, the Plaintiffs position is clear, the arbitration clause extended solely to the intended scope of the agreement entered into between the parties, *to wit*, if there were

disputes as to banking issues (overdraft fees, fees on credit cards, fees associated with savings and/or checking accounts, *etc*.), the arbitration could be expected, however, this does not extend to matters beyond the scope of the arbitration clause. To argue otherwise would be for Defendants to attempt to commit Plaintiffs to a contract "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other". *See, Hume v. United States*, 132 U.S. 406 (1889).

As clearly set forth in 9 U.S.C. §2, there are exceptions to the enforcement of arbitration "save upon such grounds as exist at law or in equity for the revocation of any contract." There is a plethora of case law which has indicated that such exceptions include: fraud, duress, and unconscionability. *Velez v. Robert J. Debry & Assoc., PC,* 2015 UT App 15; *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Miller v. Corinthian Colleges, Inc.,* 769 F.Supp.2d 1336 (2011). Furthermore, when Plaintiffs were signing the individual CAAs the agreements did not, and do not, extend to criminal activity, identity theft, and other illegal actions engaged in by Wells Fargo, which information Wells Fargo hid from its customers.

Wells Fargo has no evidence that Plaintiffs agreed to arbitrate issues relating to identity theft, and other criminal activity (RICO violations, signing up Wells Fargo customers for Prudential "MyTerm" life insurance without their consent or knowledge, *etc*.) beyond the four corners of the arbitration clause. Interestingly, Wells Fargo was offering Identity Theft Protection to Consumers at the same time it was caught up in this scandal. Exhibit C Wells Fargo Identity Theft Protection. In order to maintain its position of compelling arbitration, and dismissing the current case, Wells Fargo must—but cannot—prove that Plaintiffs agreed to arbitration after full disclosure of the contract terms and conditions. *First Options v. Kaplan*, 514 U.S. 938, 992 ("arbitration …a way to resolve those disputes -- *but only those disputes* --

that the parties have agreed to submit to arbitration".) (citations omitted). "First, the court must determine whether the parties agreed to arbitrate the dispute." *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 429 (5th Cir. 2004). This is done by determining "whether there is a valid agreement to arbitrate between the parties; and . . . whether the dispute in question falls within the scope of that arbitration agreement." *Id.* (quoting *Webb v. Investacorp, Inc*., 89 F.3d 252, 258 (5th Cir. 1996)). Even assuming, *arguendo*, that the Plaintiffs believed they were signing a valid CAA, the arbitration provision does not cover the illegal acts engaged in by Wells Fargo which extended beyond the banking services, credit card, and other services it contracted for with Plaintiffs.

Wells Fargo's argument for arbitration rests specifically upon the interpretation of a very broad arbitration clause (which clause was not negotiated between the parties, was not negotiated at arm's length, and which places Wells Fargo in a superior position in allowing Wells Fargo to use the courts, foreclose upon secured property, *etc.* without arbitration), *ergo*, everything under the sun must be submitted to an arbiter, except those areas which Wells Fargo has carved out for its own benefit. And, as noted in Wells Fargo's brief, a party "cannot rely on the contract, when it works to their advantage, and repudiate it when it works to their disadvantage." (*Island Peak*, at 12.) Similarly, Defendants cannot repudiate the contract which they have repeatedly breached through their actions, and now hide behind that contract to enforce it for their benefit.

Wells Fargo is attempting to, as they have successfully done in numerous other courts, deflect the real issues before the court from the identity theft, illegal conduct, collecting illegal fees, sending fake accounts to collection, illegally making false and fraudulent reports to credit reporting agencies, and other specific violations of law, and prior breaches of the arbitration clause by Wells Fargo, and instead focus on why the Court should compel arbitration. These

egregious breaches of the law manifest that Wells Fargo's waiving the arbitration agreement provisions is clearly an attempt to divert the Court's attention. The Plaintiffs' position is clear: the arbitration clause extended solely to the agreement entered into between the parties, *to wit*, if there were disputes as to banking issues (overdraft fees, fees on credit cards, fees associated with savings and/or checking accounts), those would ostensibly be arbitrable, however, those are not the issues before the Court, and which extends to matters beyond the scope of the arbitration clause. As clearly set forth in the Federal Arbitration Act (FAA) 9 U.S.C. § 2, this did not, and does not extend to criminal activity, identity theft, and contractual issues where there was an actual, and obvious, meeting of the minds. The Plaintiffs' SAC is replete with demonstrative examples of violations of federal and state laws, violation of criminal statutes, and examples of conduct by Wells Fargo which remove applicability of the FAA to this action.

Wells Fargo attempts to persuade this Court that it should adhere to the reasoning in the *Jabbari v. Wells Fargo & Co*., 3:15-cv-02159 VC (N.D. Cal. 2015) decision, cited by Defendants. This case was appealed and a stipulated agreement between the parties was entered into which remanded the case from the United States Court of Appeals for the Ninth District, and reinstated it in the U.S. District Court, Northern District of California, where it is still pending. Accordingly, any argument made, based upon the Court granting Wells Fargo's motion to compel arbitration, is nothing more than *obiter dictum,* from a court in another jurisdiction. (Exhibit D Jabbari Stipulated Order).

Statement of Facts

1. Wells Fargo employees began complaining to Wells Fargo management, as early as 2005, (http://fortune.com/2016/10/12/wells-fargo-fake-accounts-scandal/) that the company's high sales quota and cross-selling consumer financial products was resulting in consumer fraud.
2. Many of the Wells Fargo employees reporting the illegal conduct were not only fired, but many were blacklisted by Wells Fargo from working in the banking industry again.
3. Wells Fargo has repeatedly engaged in activity which has manifest itself in the form of illegal, unethical behavior by the company and its employees. (Exhibit E - Partial List of Consent Orders).
4. In December, 2013, reporter E. Scott Reckard, reported for the LA Times, that Wells Fargo had created a pressure-cooker sales culture. (Exhibit F) This article garnered the attention of the Los Angeles City Attorney who initiated an investigation in 2014, resulting in filing an action for California residents for identity theft, unfair competition and a variety of other actions.
5. In September, 2016, after a joint investigation between the Office of the Comptroller of the Currency ("OCC"), the Consumer Financial Protection Bureau ("CFPB"), and in conjunction with the City of Los Angeles, Wells Fargo settled the litigation with the City of Los Angeles, and with the federal agencies through a settlement and consent agreement.
6. In September, 2016 Plaintiffs filed their initial complaint.

7. Within a week of filing their initial complaint, multiple individuals had heard of the complaint and requested to be added as class representatives, and the original complaint was amended prior to service on the Defendants.
8. Prior to filing an answer, Defendants requested an extension of time to respond, which Plaintiffs granted.
9. Defendants requested a second extension, and Plaintiffs agreed to allow an additional extension of time. Given the fact that additional Plaintiffs requested to be included in the complaint, a second amended complaint (SAC) was stipulated to between the parties and Well Fargo submitted their Motions to Compel Arbitration, Motion to Stay, and Motion to Dismiss on November 23, 2016.

Plaintiffs' Accounts

The emphasis of the litigation devolves to the legitimacy of the overreaching, invalid, fraudulent accounts opened by Wells Fargo, along with other identity theft and unauthorized activity by Wells Fargo, and whether these accounts, and the unauthorized criminal activities of Wells Fargo constitutes a contractual breach which would remove the arbitration clause. Plaintiffs' Wells Fargo accounts are suspect, in general, for several reasons, including, but not limited to, Wells Fargo's documented history of falsifying signatures, documents, and knowingly engaging in fraudulent activities. Additionally, the declaration of Karen Nelson declares that all of the statements contained therein, to be true and accurate, however said declaration is deficient in numerous areas, including, but not limited to, the following numbered paragraphs:

Tara Blight "33. Wells Fargo acquired First Security and, on April 21, 2001, all First Security accounts in Utah were converted into Wells Fargo accounts and integrated into the

Wells Fargo system. On or about March 19, 2001, a conversion packet was delivered to each First Security account holder, including Travis J. Ashby. A true and correct copy of the form of the conversion packet sent to Travis J. Ashby, including a Consumer Account Agreement, is attached as **Exhibit 5-C**."

There is no Exhibit 5-C and no proof that Tara Blight received, or agreed to the Consumer Account Agreement.

Matthew C. Bishop "46. Wells Fargo acquired First Security and, on April 21, 2001, all First Security accounts in Utah were converted into Wells Fargo accounts and integrated into the Wells Fargo system. On or about March 19, 2001, a conversion packet was delivered to each First Security Bank account holder in the Utah region, including Matthew C. Bishop. A true and correct copy of the form of the conversion packet sent to Matthew C. Bishop, including a Consumer Account Agreement, is attached as **Exhibit 10-B**."

There is no Exhibit 10-B and no proof that Matthew C. Bishop received, or agreed to the Consumer Account Agreement.

Marcia Cameron "58. Wells Fargo acquired First Security and, on April 21, 2001, all First Security accounts in Utah were converted into Wells Fargo accounts and integrated into the Wells Fargo system. On or about March 19, 2001, a conversion packet was delivered to each First Security Bank account holder in the Utah region, including Marcia J. Cameron. A true and correct copy of the form of the conversion packet sent to Marcia J. Cameron, including a Consumer Account Agreement, is attached as **Exhibit 14-B**."

There is no Exhibit 10-B and no proof that Marcia Cameron received, or agreed to the Consumer Account Agreement.

Jamal Dean Focus-On-U- Photography "65. Wells Fargo's records indicate that Jamal Dean signed up to obtain business online banking, including online statements, on December 31, 2013. By signing up for and using online access, Jamal Dean agreed to the terms of the Wells Fargo Online Access Agreement. The version of the Online Access Agreement that was in effect and that Jamal Dean agreed to in enrolling in online banking in December 2013 became effective September 17, 2013, a true and correct copy of which is attached as **Exhibit 17-B**."

There is no Exhibit 17-B and no proof that Jamal Dean received, or agreed to the Online Access Agreement.

Mbegane Diouf "69. On October 19, 2012, a Wells Fargo consumer checking account (x4444) was opened for Mbegane Diouf. A true and correct copy of the application for this account is attached as **Exhibit 18-A**."

Mbegane Diouf's application is blank, and there is no evidence that Mbegane Diouf received any documentation relative to Wells Fargo account x4444. *See* Exhibit 18-A of Defendants Motion to Compel Arbitration.

Erica Bendixsen "100. On August 19, 2003, Jan Bendixsen opened a consumer savings account (x9685) with Wells Fargo. On December 15, 2003, Erica Bendixsen signed a Consumer Account Application for Relationship, Name or Title Change to be added as a joint owner along with Carrie Bendixsen and Jan Bendixson for the pre-existing Wells Fargo consumer savings account (x9685). A true and correct copy of the Consumer Account Application for Relationship, Name or Title Change form is attached as **Exhibit 29-A**."

There is no application for Erica Bendixsen, nor documentation that the Consumer Account Agreement was sent to Erica Bendixsen, or that she agreed to the terms of the purported agreement.

Ayoka Lawani "116. Wells Fargo acquired Wachovia, and on February 18, 2012, all Wachovia accounts in Maryland were converted into Wells Fargo accounts and integrated into the Wells Fargo system. On or about December 30, 2011, a conversion package was delivered to each Wachovia account holder, including Ayoka Evelyn Lawani. A true and correct copy of the welcome letter accompanying the conversion package sent to Ayoka Evelyn Lawani is attached as **Exhibit 34-B**, and a true and correct copy of the Consumer Disclosure containing the Consumer Account Agreement sent to Ayoka Evelyn Lawani is attached as **Exhibit 34-C**." There are no Exhibit's 34-B or C and no proof that Ayoka Lawani received the welcome letter and conversion package, or agreed to the Consumer Disclosure or Consumer Account Agreements. *See* Exhibit 34-A of Defendant's Motion to Compel Arbitration.

Lawrence Mitchell "122. On April 2, 1982, Lawrence Mitchell opened a Wells Fargo consumer checking account. Lawrence Mitchell signed up to obtain consumer online banking on May 20, 2005. When a customer enrolls in online banking, he or she receives notification of, and must click an "I Agree" button constituting his or her agreement to, the terms of the Online Access Agreement. The version of the Online Access Agreement that was in place when Lawrence Mitchell signed up for online banking in May 2005 was dated effective April 6, 2004, a true and correct copy of which is attached as **Exhibit 37-A**.

125. With the December 2011 statements, Wells Fargo notified its consumer banking customers that the Consumer Account Agreement would be revised effective February 15, 2012. A true and correct copy of that notification, titled "Important Change in Terms Notice: Dispute Resolution Program: Arbitration Agreement," is attached as **Exhibit 37-E.** The Change in Terms Notice was included as an insert with the account statement for x9055 sent to Kay Mitchell and Lawrence Mitchell in December 2011."

There is no application for Lawrence Mitchell, nor documentation relating to Exhibits 37-A or receipt and agreement to the "Important Change in Terms Notice: Dispute Resolution Program: Arbitration Agreement," allegedly attached as **Exhibit 37-E,** nor proof of mailing the same by Defendant, or receipt of the same by Lawrence or Kay Mitchell."

Robin Quigg "140. Wells Fargo acquired Wachovia, and over the weekend of June 11, 2011, certain Wachovia accounts in Florida were converted into Wells Fargo accounts and integrated into the Wells Fargo system, including Robin Quigg's x9160 account. (The conversion of Wachovia accounts in Florida occurred in two stages.) On or about April 29, 2011, a conversion package including a welcome letter was delivered to each Florida Wachovia account holder whose account would be converted in June 2011, including Robin Quigg. A true and correct copy of the form of the welcome letter sent to Robin Quigg is attached as **Exhibit 43-B**, and a true and correct copy of the Consumer Disclosure containing the Consumer Account Agreement included in the conversion packet sent to Robin Quigg is attached as **Exhibit 43-C**."

There are no Exhibits 43-B or 43-C, and no evidence that Robin Quigg received, or agreed to the alleged Consumer Account and Disclosure documents allegedly sent by Defendant.

Carina Rhea "144. Wells Fargo's records indicate that Carina Rhea signed up to obtain online banking, including online statements, on April 3, 2008. When a customer enrolls in online banking, he or she receives notification of, and must click an "I Agree" button constituting his or her agreement to, the terms of the Online Access Agreement. The version of the Online Access Agreement that was in effect and that Carina Rhea agreed to in enrolling in online banking in April 2008 became effective April 3, 2008, a true and correct copy of which is attached as **Exhibit 44-B**. . . . With the December 2011 statements, Wells Fargo notified its consumer

banking customers that the Consumer Account Agreement would be revised effective February 15, 2012. A true and correct copy of that notification, titled "Important Change in Terms Notice: Dispute Resolution Program: Arbitration Agreement," is attached as **Exhibit 44-D**. The Change in Terms Notice was included as an insert with the account statement for x3236 sent to Carina Rhea in December 2011."

There are no Exhibits 44-B or 44 D, and no evidence that the documents were prepared, sent to, or agreed to by Carina Rhea.

David Self Sue A. Waters and James J. Waters "150. With the December 2011 statements, Wells Fargo notified its consumer banking customers that the Consumer Account Agreement would be revised effective February 15, 2012. A true and correct copy of that notification, titled, "Important Change in Terms Notice: Dispute Resolution Program: Arbitration Agreement," is attached as Exhibit **45-B**. The Change in Terms Notice was included as an insert for the December 2011 statement for account x1623 sent to David M. Self, Sue A. Waters, and James J. Waters."

There was no Exhibit 45-B and no evidence that David Self received or agreed to the Notice referred to be Defendant in paragraph 150 of Karen Nelson's Declaration.

Anurag Sood or Supriya Sood Rev Trust – "158. Wells Fargo acquired Wachovia. On June 11, 2011, Wachovia accounts in California were converted into Wells Fargo accounts and integrated into the Wells Fargo system. On or about April 29, 2011, a conversion package was delivered to these Wachovia account holders, including Anurag Sood and Supriya Sood. A true and correct copy of the form welcome letter sent to Anurag Sood and Supriya Sood is attached as **Exhibit 47-E**; a true and correct copy of the form of the conversion packet sent to Anurag Sood and Supriya Sood, including a Consumer Account Agreement, is attached as **Exhibit 47-F**.

There are no Exhibits 47-E, 47-F, or 47-H and no documentation relating to said Exhibits being actually sent or received and agreed to by Anurag Sood including including a Consumer Account Agreement, or "Important Change in Terms Notice: Dispute Resolution Program: Arbitration Agreement."

Doug Waters "179. Wells Fargo acquired First Security and, on April 21, 2001, all First Security accounts in Utah were converted into Wells Fargo accounts and integrated into the Wells Fargo system. On or about March 19, 2001, a conversion packet was delivered to each First Security account holder, including Doug Waters. A true and correct copy of the form of the conversion packet sent to Doug Waters, including a Consumer Account Agreement, is attached as **Exhibit 54-B**."

There is no Exhibit 54-B or evidence that Doug Waters receiving the Consumer Account Agreement or agreed to the same.

Scott Westin "183. Norwest and Wells Fargo merged and, on July 8, 2000, all Norwest accounts in Minnesota were converted into Wells Fargo accounts and integrated into the Wells Fargo system. On or about June 2, 2000, a conversion packet was delivered to each Norwest account holder, including Scott Westin. A true and correct copy of the form of the conversion packet sent to Scott Westin, including a Consumer Account Agreement, is attached as **Exhibit 55-B**.

186. With the December 2011 statements, Wells Fargo notified its consumer banking customers that the Consumer Account Agreement would be revised effective February 15, 2012. A true and correct copy of that notification, titled "Important Change in Terms Notice: Dispute Resolution Program: Arbitration Agreement," is attached as **Exhibit 55-E."**

There were no Arbitration clauses in the Norwest agreements, and no Exhibits 55-B or 55-E, nor is there evidence that Scott Westin received, or agreed to the terms to said documents including a Consumer Agreement or Important Change in Terms Notice: Dispute Resolution Program: Arbitration Agreement.

Stay of Action Pending Arbitration

Plaintiffs have stipulated to staying discovery until the issue of the motion to compel arbitration has been decided. Plaintiffs reserve their right to further argue this area, if that is not the understanding of opposing counsel and the Court.

ARGUMENT

I. Defendant has Misconstrued Plaintiffs' Complaint

In the motion to compel arbitration, Defendant has misconstrued and misapplied what Plaintiffs have stated regarding account agreements. Defendants argue that in paragraph 137 of the Second Amended Complaint (SAC), Plaintiffs concede "they entered into valid and enforceable agreements with Defendants whereby Defendants promised to provide goods or services to Plaintiffs and Class Members, and Plaintiffs and Class Members agreed to pay for those goods or services, including payment made with debit or credit cards." Defendants refer to several cases which they contend that the rulings hold that paragraph 137 was an admission, and Plaintiffs now are prohibited from arguing what they stated, or in the context it was made.

One of the cases Defendant cites supporting its position is *Dean Witter Reynolds v. Byrd*, 470 U.S. 213 (1985). Defendants argue that the FAA "mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreements has been signed." (Defendants Motion to Compel Arbitration p. 1.)

However, Plaintiffs contend that the ruling in *Dean Witter* has multiple significant rulings, of which Defendants select only one portion relating to submission of arbitration agreements to arbitration. Defendants omit essential provisions of the decision which were additionally discussed by the Supreme Court. For instance, continuing to read from the same paragraph cited by Defendants, the decision continues "Thus, insofar as the language of the Act guides our disposition of this case, we would conclude that agreements to arbitrate must be enforced, **absent a ground for revocation of the contractual agreement**." *Id.* at 218 (emphasis added). Wells Fargo's admitted criminal conduct, identity theft, illegal fees being assessed against fraudulently opened accounts, are each sufficient, in and of themselves, as grounds for

revocation of the contractual agreement. But taken together, these illegal activities are clearly sufficient to constitute grounds for revocation of the contract.

Continuing on, Wells Fargo's cites several cases relating to mandatory arbitration rulings, which for the most part constitute nothing more than relentless red herring attacks using unpublished decisions to allege that Plaintiffs "conceded the enforceability of the CAA agreements," which is not only repetitive and off point, but extremely tiring. Plaintiffs have contended that the agreements are valid on their face, however, that was prior to the time they learned of the fraudulent activities and non-disclosure of material facts by Wells Fargo, thereby rendering the CAA's invalid due to Wells Fargo's fraud, and admissions against interest by their CEO, along with a settlement, based on substantially the same facts with the OCC, CFPB, and City of Los Angeles.

Wells Fargo's variety of cases cited for the purpose of compelling arbitration, or that paragraph 137 of the SAC conceded a valid agreement, are not applicable to the present issue. There are no factual admissions, no matter how much Wells Fargo wants to contort, or misconstrue one, of 309 paragraphs in the SAC. The Justices in *Dean Witter* enunciated that "[w]hen arbitrable and nonarbitrable claims arise out of the same transaction, and are sufficiently intertwined factually and legally, the district court, under this view, may in its discretion deny arbitration as to the arbitrable claims and try all the claims together in federal court." *Id*. at 217. Assuming that some of the causes of action could fall within arbitrable claims, which is denied, due to the criminal actions of Wells Fargo which revoked any CAA arbitration provisions, all claims should be tried together in federal court, per *Dean Witter*. Furthermore, Justice White declared in his concurring opinion, that "the 1934 **Act does explicitly provide a private right of action to victims of certain illegal conduct.**" *Id.* (emphasis added). This is exactly what the

Plaintiffs contend in their Complaint. Exactly on point with the admission of fraud made by Wells Fargo's then CEO John Stumpf before Congress. Exactly what Wells Fargo agreed to in the settlement with the City of Los Angeles, and with the consent order with the OCC and CFPB.

Defendants extrapolate one paragraph from a complaint, which contains 309 allegations, rely their entire argument on that one paragraph, and expect the court to completely disregard the remainder of the complaint, *in toto*. _Unfortunately, the paragraph they want the Court to direct a laser focus on, is one wherein Plaintiffs acknowledge that when those Plaintiffs who did execute an agreement with Wells Fargo, and not some other bank taken over by Wells Fargo, at the time of execution they assumed the agreement was valid and that Wells Fargo was an honest business. Plaintiffs were unaware, that while Wells Fargo was opening, or servicing their accounts, Wells Fargo was simultaneously selling identity theft protection services. During this same timeframe in which Wells Fargo was selling identity theft protection services, Wells Fargo was breaching the CAA by engaging in identity theft, charging illegal fees, sending them to collection agencies over fraudulent accounts, and other activities which have been deemed pervasive and misleading by courts and regulators. (Exhibit G - Wells Fargo Settlement CFPB)

Class Members admit that there were contracts between Wells Fargo and Members. The contract, as a whole, was valid and enforceable agreement. However, certain provisions, clauses, or sections of contracts can be struck as invalid even while the rest of the contract constitutes a valid and enforceable agreement. Class members do not contend that they never entered into a contract with Wells Fargo, but rather contend that the arbitration agreement is invalid based upon commonly applicable formation defenses, or that the arbitration agreement did not intend to cover illegal actions. This kind of situation must have been anticipated because 9 U.S.C §2

provides explicitly that arbitration clauses in contracts may be struck as void. Implicitly, the rest of the contract would be valid, with the invalid arbitration provision being struck down.

Defendants even anticipated that parts of the arbitration agreement may be unenforceable while drafting the CAA:

> This agreement and any resulting arbitration are governed by the provisions of the Federal Arbitration Act (Title 9 of the United States Code), and, to the extent any provision of that act is inapplicable, unenforceable or invalid, the laws of the state that govern the relationship between you and the Bank. If any of the provision of this arbitration agreement dealing with class action, class arbitration, private attorney general action, other representative action, joinder, or consolidation is found to be illegal or unenforceable, that invalid provision shall not be severable and this entire arbitration agreement shall be unenforceable. Page 4, Wells Fargo Consumer Account Agreement - Effective April 1,2013

Next, Defendants contend that the ruling in *Brookwood v. Bank of Am*., 45 Cal. App. 4th 1667 (1966), compels Plaintiffs to read the terms of the contract, and that Wells Fargo had no duty to explain to them the contractual agreement they were entering into ("[n]o law requires that parties dealing at arm's length have a duty to explain to each other the terms of a written contract, particularly where, as here, the language of the contract expressly and plainly provides for the arbitration of disputes arising out of the contractual relationship.").

The citation by Wells Fargo from *Brookwood* is priceless, given the factual background of this case. Defendant argues that there is no duty to explain the terms of a written agreement, where the contract expressly and plainly provides for arbitration. The *Brookwood* case additionally points out that "the California Supreme Court has '*warned against 'procedural gamesmanship' aimed at undermining the advantages of arbitration*.'" *Brookwood*, 45 Cal. App. 4th 1667, 1671 (1966) (quoting *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal. 3d 312, 323 [197 Cal. Rptr. 581, 673 P.2d 251). The Court continues, "California law states: "A written agreement to submit to arbitration an existing controversy or a

controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract. (Code Civ. Proc., § 1281.)." *Id.* The claims in this case did not arise after there was a meeting of the minds because, among other things, Wells Fargo failed to disclose material matters relating to the subject matter of the agreement, including Wells Fargo's nefarious, illegal behavior which constitute grounds for revocation. Furthermore, Wells Fargo's breached the contract by its admitted illegal and fraudulent activities, and waived any right to assert arbitration.

Brookwood goes on to state: "Reliance on an alleged misrepresentation [or, by extension of reasoning, a unilateral mistake not encouraged or fostered by the other party,] is not reasonable when plaintiff could have ascertained the truth through the exercise of reasonable diligence. Reasonable diligence requires the reading of a contract before signing it. A party cannot use his own lack of diligence to avoid an arbitration agreement." *Id.* at 1674 (internal citations omitted). Likewise, where one party intentionally misrepresents, or omits to disclose material information (such as "we will be stealing your personal information, and using it to open fraudulent accounts in your name, contrary to the privacy protection rights we have disclosed to you"), a meeting of the minds is not unlikely- it is impossible.

Regardless of whether Plaintiffs opened accounts directly with Wells Fargo, or with other financial institutions acquired by Wells Fargo, Wells Fargo's criminal behavior, misrepresentations, selling identity protection products, while simultaneously engaging in identity theft, is not only a conflict of interest, but illegal. And, once more, constitutes additional grounds for the revocation of the contract, in addition to the identity theft, deception and other acts previously discussed.

Defendants further argue that customers were notified that there was an arbitration provision contained in the application, and accordingly, "any disputes" thereafter, are the subject to arbitration. However, once again, this is very misleading. The terms and conditions of the arbitration agreement, much like posting provisions, are contained in documents that are hurriedly pushed before consumers and forced to sign in order to open up any basic account.

Defendants next contend that the *Ackerberg v. Citicorp USA, Inc*., 898 F. Supp. 2d 1172 (N.D. Cal. 2012) is directly on point. Unfortunately, once again, this may be applicable for a normal arbitration case but it is not applicable in the case before this Court. The questions before the court are simple: (1) Is the Wells Fargo Consumer Account Agreement valid on its face? There is nothing in the documents which would contend otherwise. (2) Does the fact that an arbitration clause is contained in an agreement dispositive of its validity, or enforceability? On its face the appearance of a valid agreement is present. Clearly, however, it is impossible to have had a meeting of the minds when critical information was intentionally withheld by one side to the agreement. As noted in the FAA, and supported by plethora of case law, including *Dean Witter,* the FAA does not mandate arbitration of all claims where arbitration provisions are present. The specific agreement is still subject to contract defenses, including fraud, duress, illegality, *etc*. which has been amply demonstrated. (Exhibit H Affidavit of Paul Dubow)

As noted by Mr. Dubow, Defendants refuse to address the scope of the agreement. Plaintiffs are not bound by conditions outside a typical banking agreement. Defendants are attempting to hide behind the FAA and deal with one person at a time to avoid the totality of their actions. Defendants are continuing in their deceptive business practices and misleading the court in an effort to avoid public disclosure of their dirty, illegal,

unethical behavior, which has been repeated over and over, and, because Defendants have been deemed “too big to fail,” they apparently also consider themselves “too big to be regulated and required to follow the law.”

II. The Arbitration Agreement is Unenforceable

This Court should deny the motion to compel arbitration because the arbitration agreement is unenforceable.

When dealing with arbitration agreements, courts take a two prong analysis. “Before compelling a party to arbitrate pursuant to the FAA, a court must determine that; (1) there is an agreement to arbitrate, and (2) the dispute at issue falls within the scope of that agreement.” *Century Indem. Co. v. Certain Underwriters at Lloyd's*, 584 F.3d 513, 523-24 (3d Cir. 2009) (citing *Kirleis*, 560 F.3d at 160 (citing *Trippe Mfg. Co. v. Niles Audio Corp.*, 401 F.3d 529, 532 (3d Cir. 2005)); *China Minmetals Materials Imp. & Exp. Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274 (3d Cir. 2003)). The U.S.C. specifically permits arbitration agreements to be held unenforceable: “The final phrase of 9 U.S.C. § 2 permits arbitration agreements to be declared unenforceable upon such grounds as exist at law or in equity for the revocation of any contract. This saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S. Ct. 1740, 1746 (2011)(citations omitted). Specifically, courts apply ordinary state law principles that govern the formation of contracts. “To determine whether the parties have agreed to arbitrate, we apply "ordinary state-law principles that govern the formation of contracts." *First Options v. Kaplan*, 514 U.S. at 944,

115 S.Ct. at 1924; *Perry v. Thomas*, 482 U.S. 483, 492 n.9, 107 S. Ct. 2520, 2527 n.9, 96 L. Ed. 2d 426 (1987).

Plaintiffs recognize, however, that there is a general policy that favors arbitration. The United States Supreme Court has interpreted the FAA as having a purpose of upholding the integrity of these agreements rather than subject them to the courts. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). In *Concepcion*, the Court held that lower courts' findings of unconscionability in the arbitration agreement at issue were void, given that the FAA trumped them as a federal statute. *Concepcion*, 563 U.S. at 345–47. And yet, the FAA preserves legal and equitable defenses to the formation of arbitration agreements, as they are a type of contract. 9 U.S.C. § 2; *see also Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 534 (2012) (directing the West Virginia court to consider on remand whether the arbitration clauses at issue were "enforceable under state common-law principles" that did not include general public policy grounds). Thus, while the presumption under the law would favor arbitration, the agreement at issue in this case must be interpreted according to contract law. Doing so results in finding it unenforceable against the plaintiffs.

Defendants attempt to persuade the court that interpretation of the CAA arbitration provisions are at the discretion of an arbitrator. Once again, however, it must be crystal clear that once the Defendants engaged in millions of cases for fraud, identity theft, and other criminal behavior, those acts are not governed by the CAA. As noted by Paul Dubow, the arbitration clause extends only to those activities agreed to between the parties, and once Wells Fargo breached the agreement, it became the providence of the Court to determine the extent of the damages sustained by Plaintiffs and class members. Plaintiffs have never, and under no cognizable provisions which Wells Fargo could fabricate, would they ever agree to a contract

interpretation of the arbitration clause as described by Wells Fargo, wherein they waive their ability to have a court determine their rights to seek redress for criminal violations engaged in by Wells Fargo.

Defendants further attempt to persuade the court to enforce arbitration, citing to the *Jabbari v. Wells Fargo & Co*. case. As stated earlier, as both parties have since stipulated to remand the case back to the district court, any findings by Judge Chhabria would be *obiter dictum* and not controlling or persuasive in this matter. Of particular concern, in Judge Chhabria's *dictum*, is the fact that it is acknowledged by the Judge that Plaintiff Heffelfinger's disputed accounts had been opened by Wells Fargo *two weeks prior* to her ever signing an applications for services. The Judge held that it was plausible that the "unauthorized" accounts were originated after she opened a valid account, and thus the arbitration issue was not wholly groundless. (*Jabbari,* September 23, 2015, Order Granting Defendant's Motions to Compel Arbitration, p. 3)

In this case, the arbitration agreement is void or voidable under the state, federal, and common law principles on numerous theories, including, but not limited to, lack of mutual assent, unconscionability, misrepresentation, mistake, fraud, and illegality.

II(A). The Arbitration Agreement is Void For Lack of Mutual Assent

The FAA allows for contracts to be voided for "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. Lack of mutual assent is one of such grounds. This contract is void under the FAA because there was never mutual assent.

"Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Spahr v. Secco*, 330 F.3d 1266, 1269 (10th Cir. 2003) (quoting *AT & T Techs.*, 475 U.S. at 648) (internal quotations omitted). Although the presence of an arbitration clause generally creates a presumption in favor of arbitration, *see ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1462 (10th Cir. 1995) ("If a contract contains an arbitration clause, a presumption of arbitrability arises, particularly if the clause in question contains . . . broad and sweeping language."), "this presumption disappears when the parties dispute the existence of a valid arbitration agreement." *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1220 (10th Cir. 2002); see also *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 779 (10th Cir. 1998) ("[W]hen the dispute is whether there is a valid and enforceable arbitration agreement in the first place, the presumption of arbitrability falls away."). Courts "apply ordinary state-law principles that govern the formation of contracts' to determine whether a party has agreed to arbitrate a dispute." *Bellman v. i3Carbon, LLC*, 563 F. App'x 608, 613 (10th Cir. 2014). (quoting *Walker v. BuildDirect.com Techs., Inc.*, 733 F.3d 1001, 1004 (10th Cir. 2013)(quoting *Hardin v. First Cash Fin. Servs., Inc.*, 465 F.3d at 475 (10th Cir. 2006))

Utah law requires a meeting of the minds, or mutual assent to form a valid contract. *See e.g. Brown's Shoe Fit Co. v. Olch*, 955 P.2d 357, 363 (Utah Ct. App. 1998) ("A binding contract can exist only where there has been mutual assent by the parties manifesting their intention to be bound by its terms." (citations omitted)).

The United States Supreme Court has stated: "It is essential to the validity of a contract that the parties should have consented to the same subject-matter in the same sense". *Utley v. Donaldson*, 94 U.S. 29, 48 (1876).

Plaintiffs, and other members of the class, never intended to limit their judicial remedies for the kinds of illegal actions that Wells Fargo committed. Class members intended to agree to arbitrate things generally associated with bank accounts: things such as account balances, ATM fees, overdraft fees, or simply put- disputes that a consumer would expect to be associated with a bank account. Class members never agreed to arbitrate disputes that were so egregious that they require congressional hearings, lead to the firing of the firing of a CEO, or behavior so outrageous it became an international scandal.

Wells Fargo never disclosed to one single individual that Wells Fargo was engaged in criminal activities which would be considered as mutually agreed upon terms. The specific breadth of the agreement is as follows, directly from the definition section of the agreement supplied to customers, *i.e.*, "The parties agree that in this relationship: (1) The parties are participating in transactions involving interstate commerce." 2013 Consumer Account Agreement, page 4. Criminal activity is not included, nor can there by any conceivable extrapolation of the term interstate commerce which would include consent to identity theft, subscribing individuals to MyTerm insurance without their consent or knowledge, funding credit cards or other accounts without the consumer's knowledge or consent, using the consumer's name and confidential information to create false email addresses, pin numbers, passwords, or consent to submitting false reports to credit reporting agencies, etc.

Wells Fargo's illegal activities were completely beyond the scope of the intended coverage by this agreement. Clearly there is a limit to how far this arbitration agreement extends. For example, if a Wells Fargo customer entered a branch location and robbed the bank, would it be reasonable for that customer to be able to demand that the bank call an arbitration

panel instead of the police to return the money to the bank? Under Wells Fargo's line of argument, a robber with a bank account could demand arbitration and the case would of necessity be removed from the judicial system and placed in the hands of an arbitration panel instead. Wells Fargo never agreed to that kind of extreme and illegal behavior to be arbitrated. Likewise, no customer in the world actually intended to agree to arbitrate a disagreement when their bank stole their identity to create fake accounts. The subject-matter of criminal activity was so far beyond the scope of the parties' initial agreement, it was never meant to be arbitrated. Because neither party consented to the same subject-matter in the same sense, the contract for arbitration is invalid. *See Utley v. Donaldson*, 94 U.S. 29, 48 (1876).

II(B). The Agreement to Arbitrate is Void for Unconscionability

The FAA allows for contracts to be voided for "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. Unconscionability is one of such grounds. The arbitration provision of this contract is void under the FAA because it is unconscionable.

Federal Law describes unconscionable contracts are those that "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other;" damages were then limited to those to which the aggrieved party was "equitably" entitled. *Hume v. United States*, 132 U.S. 406 (1889).

Utah law allows for unconscionable contracts or clauses to be voided by the court:

> U.C.A.§70A-2-302. Unconscionable contract or clause.
> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable

> opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

This law has been explained to invalidate unconscionable contracts: "If a contract is unconscionable, in whole or in part, the court may, on equitable grounds, refuse to enforce the unconscionable provisions, or it may construe the contract to avoid an unconscionable result." *Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395, 402 (Utah Sup.Ct. 1998) (quoting *Bekins Bar V Ranch v. Huth*, 664 P.2d 455, 459 (Utah 1983)).

The Restatement (2d) also provides that contracts with unconscionable portions are invalid.

> "If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result". Restatement 2d § 208.

Courts apply a two pronged analysis to determine whether a contract qualifies as unconscionable: "The first prong—substantive unconscionability—focuses on the agreement's contents. The second prong—procedural unconscionability—focuses on the formation of the agreement." *Burkett v. Convergys Corp.*, 2015 U.S. Dist. LEXIS 96781, at *10 (D. Utah July 23, 2015) (quoting Ryan, 972 P.2d at 402 (citing Sosa, 924 P.2d at 360). Unconscionability is determined "according to the mores and business practices of the time and place." *Id.* (quoting *Sosa*, 924 P.2d at 361 (quoting *Res. Mgmt. Co. v. Weston Ranch & Livestock Co., Inc.*, 706 P.2d 1028, 1042 (Utah 1985) (quoting *Bekins Bar V Ranch v. Huth*, 664 P.2d 455, 462 (Utah 1983)).

II(B)(1) Substantive Unconscionability

Substantive unconscionability "requires evidence that a term is 'so one-sided as to oppress or unfairly surprise an innocent party.'" *Burkett v. Convergys Corp.*, 2015 U.S. Dist. LEXIS 96781, at *10 (D. Utah July 23, 2015) (quoting Sosa v. Paulos, 924 P.2d 357, 362). "The terms of the contract should be considered 'according to the mores and business practices of the time and place.'" *Id.* at *10 361 (quoting Sosa v. Paulos, 924 P.2d 357, 362 (quoting *Res. Mgmt. Co. v. Weston Ranch & Livestock Co., Inc.*, 706 P.2d 1028, 1042 (Utah 1985) (quoting *Bekins Bar V Ranch v. Huth*, 664 P.2d 455, 462 (Utah 1983)).

In *Lee v. Intelius Inc*, the 9th Circuit dealt with a problem similar to the arbitration agreement in this case. In that case, the Court of Appeals held that an agreement to arbitrate is invalid when even a careful consumer would not have known that he was agreeing to arbitrate a certain provision. *Lee v. Intelius Inc.*, 737 F.3d 1254 (9th Cir. 2013).

Similar to *Lee*, the class members in this case are unfairly surprised. Despite Defendant's assertion that "Plaintiffs can hardly claim surprise that unauthorized activity is covered when their Consumer and Business Account Agreements explicitly contemplate disputes related to such activity", the activity in question did surprise Plaintiffs. *See* Defendant's Motion to Compel Arbitration, p.14. First, they were surprised to see breach of trust they had in a banking institution. Shortly thereafter, they were surprised to see that Wells Fargo is attempting to force arbitration on such claims. As mentioned previously, the context and performance of the signed banking agreements give no indication that illegal activities would be included as "any dispute" within the arbitration agreement. Class Members were surprised to learn that by signing up for their accounts, they had apparently agreed to arbitrate claims for the egregious actions of Wells Fargo.

Furthermore, when Plaintiffs signed the Consumer and Business Account agreements, the language "unauthorized transactions", which include "a missing signature, an unauthorized signature...or otherwise a transaction that was not authorized by you." was included. However, not a single individual upon reading these statements was under the delusion proposed by Defendant that this included Wells Fargo committing fraud or engaging in widespread criminal activity. Rather, all individuals reading such language would understand the meaning that "unauthorized transactions" would relate to transactions taken by a third party not associated with the bank.

Even the most careful or suspicious consumer would not have expected that by signing up for a free checking account, he was giving Wells Fargo *carte blanche* to do whatever illegal activity it wanted with the ensuing claims going to arbitration. The scandalous nature of Wells Fargo's activities in this case only highlights that nobody would have expected this kind of behavior from a bank (including members of Congress). If the behavior was so unexpected and surprising to the country as a whole, reason dictates that the parties to the contract did not expect to govern these kinds of actions. Therefore, it is an unfair surprise to force arbitration on countless unsuspecting victims in this case.

Additionally, it is an unfair surprise that the fake accounts opened by Wells Fargo are "governed" by the account agreement of legitimate accounts. Every time a new account is created, customers receive a new account agreement. Motion to Compel Arbitration p. xliv. This is common business practice, and is what every consumer has come to expect. It is nonsensical for a customer to claim they unilaterally opened an investment account with Wells Fargo and they decided that the fees associated with the investment account would be governed by the old agreement for a checking account. Likewise, it is an unfair surprise for class

members to find that there are new unauthorized accounts opened, and even more surprising for the members to find out that the new accounts are governed by a contract for a different account.

II(B)(2) Procedural Unconscionability

In addition to being void solely based upon substantive unconscionability, procedural unconscionability also voids the contract.

"Procedural unconscionability focuses on the negotiation of the contract and the circumstances of the parties." *Ryan v. Dan's Food Stores*, 972 P.2d at 403 (citation omitted). "[The] principle inquiry is whether there was overreaching by a contracting party occupying an unfairly superior bargaining position." *Id*. (citation omitted). To evaluate procedural unconscionability, Utah courts look to the following factors: (1) whether each party had a reasonable opportunity to understand the terms and conditions of the agreement; (2) whether there was a lack of opportunity for meaningful negotiation; (3) whether the agreement was printed on a duplicate or boilerplate form drafted solely by the party in the strongest bargaining position; (4) whether the terms of the agreement were explained to the weaker party; (5) whether the aggrieved party had a meaningful choice or instead felt compelled to accept the terms of the agreement; and (6) whether the stronger party employed deceptive practices to obscure key contractual provisions. .*Id.* at 403.(citation omitted). "None of the factors is dispositive; rather, [courts] consider all the circumstances in light of the doctrine's purpose to prevent oppression and unfair surprise." *Id.*

When looking at the six factors as laid out by *Ryan*, the arbitration agreement section of the contract for banking services meets the burden to be procedurally unconscionable.

Looking at a totality of the circumstances, it becomes clear that procedural unconscionability applies in this case.

1. While both parties had an opportunity to review the language, no member of the class understood that Wells Fargo intended the terms and conditions explaining "any dispute" to extend to willful criminal activity on the bank's part.
2. This contract was a contract of adhesion, presented in a take it or leave it fashion.
3. Prong 3 of the test is met because the arbitration agreement was drafted solely by the bank, who held the stronger bargaining position. The agreement was a boilerplate agreement, with the arbitration agreement hidden on pages after signatures on credit card applications, or "within the first 10 pages" as noted by Defendants.
4. The terms of the agreement were not explained to the members of the class. Even if Wells Fargo took the time to explain the terms of the contract, which it did not do, it did not explain that the arbitration agreement extended as far as Wells Fargo now claims it does.
5. Class members had a choice to choose other banks. However, they did not have a meaningful choice, because the choice to bank with Wells Fargo was not fully informed. Without knowledge of the extent of the arbitration agreement, class members could not have a meaningful choice.
6. Wells Fargo, being in the stronger bargaining position could have, and should have explained clearly that disputes between parties were not just standard banking disputes, but included willful criminal activity.

Each of these factors contribute to the CAA's procedural unconscionability. When viewed together, especially in light of the substantive factors, the CAA is void for unconscionability.

II(C) The Arbitration Clause is Voidable Due to Mistake

The FAA allows for contracts to be voided for "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. Mistake is one of such grounds. The arbitration provision of this contract is void under the FAA because of mistake.

Restatement (Second) of Contracts allows for voidable contracts in the case of mistake.

> § 153 When Mistake of One Party Makes a Contract Voidable
>
> Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and
>
> (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or
>
> (b) the other party had reason to know of the mistake or his fault caused the mistake.

One of the basic assumptions of class members in this case was that the contract would not cover Wells Fargo's illegal actions. As mentioned previously, the class members were mistaken about the extent of the contract. The scope of the contract is material in this case because it affects the rights of both parties. The enforcement of this provision would make the contract unconscionable, as previously discussed. Additionally, if Wells Fargo knew (which, logically must have happened in order for there to be a meeting of the minds) that these kinds of illegal actions were intended to be covered by the CAA, then it had a duty to explain to consumers that when they signed up for a checking account the client was intending intentional, illegal actions by Wells Fargo with no judicial remedy. Wells Fargo would have

been in a position to know that the consumers were in a position where they were mistaken, and failed to correct the mistake by withholding information.

II(D) The Contract is voidable due to Wells Fargo's Misrepresentation

The FAA allows for contracts to be voided for "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. Misrepresentation is one of such ground. The arbitration provision of this contract is voidable under the FAA because of Wells Fargo's misrepresentation.

Wells Fargo, if it knew that the kinds of actions in this case were covered by the CAA, had a duty to disclose such information. The effect of such non-disclosure amounts to an assertion. Restatement (Second) of Contracts §161 addresses this issue:

> "A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only:
>
> (a) where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material.
>
> (b) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.
>
> (c) where he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part.
>
> (d) where the other person is entitled to know the fact because of a relation of trust and confidence between them."

The Restatement on Contracts allows for two situations where a misrepresentation to render a contract voidable. The applicable situation is found under §164(a) which states: "If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by

the recipient." When Defendant failed to make known that this was covered by the arbitration agreement, it was of such a grave nature as to become an assertion that it was not governed by the arbitration agreement. Class members were induced into assent based on this material misrepresentation. But for the lack of Wells Fargo neglecting to mention that criminal activity was governed by an arbitration agreement, class members would not have agreed to the CAA.

II(E) The Contract is Voidable Due to Well Fargo's Fraudulent Inducement

The FAA allows for contracts to be voided for "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. Fraud is one of such ground. The arbitration provision of this contract is voidable under the FAA because of Wells Fargo's fraudulent activity.

The Second Circuit Court of Appeals stated: "If this arbitration clause was induced by fraud, there can be no arbitration; and if the party charging this fraud shows there is substance to his charge, there must be a judicial trial of that question before a stay can issue in a case of the type with which we are now dealing." *Robert Lawrence Company, Inc., vs Devonshire Fabrics, Inc.*, 271 F.2d 402 (2nd Cir. Court of Appeals 1959).

If, as Wells Fargo argues, Wells Fargo knew that its ongoing criminal activity was going to be covered by this contract, they had a duty to disclose that information to Class Members. Failure to do so would constitute fraudulent inducement into the contract because Wells Fargo knowingly failed to disclose a material facts surrounding the contract. Conversely, if Wells Fargo contends that they did not know of the illegal activities transpiring, they cannot now allege the criminal conduct is within the "intent" of the parties to the agreement.

II(F) Illegality nullifies contract formation

The FAA allows for contracts to be voided for “such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. §2. Illegality is one of such grounds. The arbitration provision of this contract is void under the FAA because of illegality.

The general rule surrounding illegality is that that "every contract in violation of law is void," *Castleglen, Inc., v. Resolution Trust Corp.*, 984 F.2d 1571, 1582 (10th Cir. 1993) (quoting *Baker v. Latses*, 60 Utah 38, 141, 206 P. 553, 555 (1922)).

There is an underlying issue of illegality in this contract. If Wells Fargo’s arguments hold true, class members consented to a contract in which Wells Fargo could commit financial crimes against class member, misappropriate their identities, and a plethora of other crimes without their consent. Underlying this kind of contract is a bizarre situation where the perpetrator holds contractual power to commit actions which with consent would be legal, but are now being committed without consent based on the pretense of an umbrella contract.

III. Even if the Arbitration Agreement is Valid, the Parties Never Intended These Kinds of Disputes to be Within the Scope of the Agreement

This Court should deny the motion to compel arbitration because the disputes in the case do not fall within the scope of the agreement, rendering the arbitration agreement unenforceable

If the Court holds that the arbitration agreement provision and its underlying contract are both valid, the next step is for the court to determine whether the parties intended for the disputes brought in this case to be covered by the arbitration agreement. *See Century Indem. Co. v. Certain Underwriters at Lloyd's*, 584 F.3d 513, 523-24 (3d Cir. 2009).

Parties cannot be required to arbitrate disputes they have not agreed to submit to arbitration. *United Steelworkers of Am. V. Warrior & Gulf Co.* 363 U.S. 574 (1960) (“For arbitration is a matter of contract and a party cannot be required to submit to arbitration any

dispute which he has not agreed so to submit.”). Parties must agree “clearly and unmistakably” to arbitrate the dispute. *AT&T Techs. v. Communs. Workers of Am.*, 475 U.S. 643, 649. For parties to be subject to an arbitration agreement under the Federal Arbitration Act (FAA), they must consent to it. *See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

The interpretation of the contract containing the arbitration agreement is governed by standard contract analysis. See e.g. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 624, 105 S. Ct. 3346, 3352 (1985)(describing the way to handle the analysis as “a matter of standard contract interpretation”).

Under Utah law, Courts first look to the contract's plain language to determine the parties' intent. *Nolin v. S & S Const., Inc.*, 2013 UT App 94, ¶ 12, 301 P.3d 1026, 1029. "A contractual term or provision is ambiguous if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies." *Meadow Valley Contractors, Inc. v. State Dep't of Transp.*, 2011 UT 35, ¶ 64, 266 P.3d 671, 687 (quotation marks and citation omitted). Courts follow a two-step process to resolve ambiguous language in contracts: first courts "seek to resolve the ambiguity by looking to extrinsic evidence of the parties' intent. If extrinsic evidence does not resolve the ambiguity and uncertainty remains, only then will [courts] resolve the ambiguity against the drafter." *Burkett v. Convergys Corp.*, 2015 U.S. Dist. LEXIS 96781, at *2223 (D. Utah,2015).
(quoting *Meadow Valley Contractors, Inc. v. State Dep't of Transp.*, 2011 UT 35, ¶ 64, 266 P.3d 671, 687(citations and footnotes omitted)).

III(A) Ambiguities Surrounding the Contract Exist, and can be Resolved Through a Reasonable Interpretation.

The plain language of the contract revolves around the phrase:

> "If you have any dispute with the Bank, and you are not able to resolve the dispute informally, you and the Bank agree that upon demand by either you or the Bank, the dispute will be resolved through the arbitration process set forth in this part. A "dispute" is any unresolved disagreement between you and the Bank. It includes any disagreement relating in any way to *services*, accounts or matters...It includes claims based on broken promises or contracts, torts, or other wrongful actions. It also includes statutory common law, and equitable claims." (Exhibit I Wells Fargo Dispute Resolution, p. 4)

In this case, the phrase "any dispute" is ambiguous because there is a fundamental question whether "any" includes every possible dispute in the world, or if "any" is limited to disputes that are typical of the bank-client relationship.

Wells Fargo's argument hinges on the use of the word "any dispute with the Bank" in the contract. "A dispute is any unresolved disagreement between you and the bank". *See* Motion to Compel p. 12. Wells Fargo emphasizes the broad nature of this word and claims that the contract clearly and unmistakably assigns to arbitration.

Plaintiff argues that a reasonable interpretation of the word "any dispute with the Bank" resolves any ambiguities: those disputes associated with managing a bank account. The context of the phrase in the middle of a banking agreement shows what the word "any" means. Both parties intended to agree to arbitrate things generally associated with bank accounts: things such as account balances, ATM fees, overdraft fees, or simply put- disputes that a consumer would expect to be associated with a bank account. As previously discussed, if willful criminal activity, identity theft, and fraudulently opening accounts was a reasonable interpretation of the contract, congressional hearings would not be necessary to examine what happened. CEOs would not need to be fired, nor would Wells Fargo's activities receive such uproar across the nation.

Utah case law has found the word "any" can be ambiguous. Utah District Court recently addressed a case that surrounded the use of "any claim or lawsuit" in regards to a provision accelerating the statute of limitations in an employment contract. In *Burkett v. Convergys*, a contract for employment had a provision that required that "any claim or lawsuit" relating to employment must be brought within 6 months of the claim arising. The court stated: "However, because the phrase "any claim or lawsuit relating to my employment"; is ambiguous, and because Ms. Burkett complied with a reasonable interpretation of that clause [Ms. Burkett's claim may go forward]." *Burkett v. Convergys Corp.*, 2015 U.S. Dist. LEXIS 96781, 2015 WL 4487706. Like *Burkett*, the word "any" is ambiguous in this case, raising a question as to what the parties intended to cover when agreeing to arbitrate.

When ambiguity exists in a contract, the intention of the parties must prevail. *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 937 (2015)(J.J. Ginsberg, Breyer, Sotomayor, Kagan, concurring) (quoting 11 R. Lord, Williston on Contracts §30:2, p. 27 (4th ed. 2012) (Williston)) ("Ambiguity in contract the intention of the parties, to be gathered from the whole instrument, must prevail.").

III(A)(1) Intent of the Parties

At least four means of contract analysis lead to the conclusion that the parties did not intend to include Wells Fargo's illegal actions within the scope of the arbitration agreement.

First, common usage. The court must ask whether each consumer reasonably believed that when they entered into a contract for a new checking account, they were agreeing to arbitrate civil claims for criminal conduct. Even the most meticulous and exceptionally careful consumer would have no reason to suspect he was agreeing to arbitrate such matters. When taken

in the context of the normal course of dealing with a bank, no transaction in this situation would extend to granting the bank rights to open new accounts or to agreeing to waive the right to sue in court for criminal behavior. If the roles were reversed in the situation, it would be laughable to suggest that a man committing robbery at a Wells Fargo branch could demand that the situation be resolved through arbitration.

Second, *Noscitur a Sociis*, where one can determine the meaning of a word or phrase based on the words and phrases surrounding it.. The contract specifically deals with banking transactions. We can assume based on what is around it, that it intended to be banking transactions. Specifically, the document states "It includes any disagreement relating in any way to services, accounts or matters." The words within the CAA point the objective viewer to see that identity theft is not one of the services provided by Wells Fargo, and fake accounts are not an account intended to be governed by a real contract.

Third, under the principle of *Ejusdem Generis*, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. In this case, the entire agreement deals with regular banking transactions. The arbitration agreement can be construed to embrace only object similar in nature to what the contract was made to cover: banking transactions, services, accounts or matters.

Finally, *Expressio Unius*, which means expression (or inclusion) of one thing indicates exclusion of the other. Wells Fargo expressly enumerated things the contract was intended to cover. Even in the end of the contract, which states that the arbitration agreement will cover "broken promises or contracts, torts, or other wrongful actions. . . .It also includes statutory common law, and equitable claims" shows the very fringes of what the contract may be

construed to cover. Wells Fargo, in drafting the document took the effort to list things that it wanted to include in the contract. Some of these enumerated subjects are clearly outside the realm of normal banking transactions, yet Wells Fargo did not take the time to enumerate fraud, identity theft, mortgage fraud, violation of their own privacy policies, or civil penalties for their criminal activity. Therefore, under the principle of *expressio unius*, the Court can discern that the parties did not intend Wells Fargo's actions in this case to be covered.

III(A)(2) Ambiguity Should be Construed Against the Drafter of the Document

If the Court cannot come to a conclusion as to the intent of the parties using the tools above, the Court should construe any remaining ambiguities against Wells Fargo. According to the doctrine of *contra proferentem*, any clause that appears to be ambiguous should be interpreted against the interest of the drafter. *Tahitian Noni Int'l v. Dean*, 2009 U.S. Dist. LEXIS 5671, at 10 (D. Utah Jan. 26, 2009) ("the doctrine of *contra proferentem* requires the court to construe any ambiguities against the drafter")(citing *Kellogg v. Metropolitan Life Ins. Co.,* 549 F.3d 818, 830 (10th Cir. 2008)).

Defendants provided a boilerplate, take it or leave it document, which included an ambiguous "any dispute" provision within the arbitration agreement clause. Defendants had the time and effort to draft the CAA, and the ambiguities that remain should be construed against them. While the word "any" is a broad word, if it was intended to cover these kinds of actions, it should have been clearly and unambiguously stated that civil remedies for criminal actions by the bank must be arbitrated. As stated throughout this Objection, Plaintiffs never believed that the misconduct by Defendants was covered in the Arbitration Agreement. Defendants have zealously advocated to this Court and to Congress, that the Arbitration Agreement includes any

dispute whatsoever. This exemplifies that an ambiguity does exist. As there is ambiguity, the resulting dispute should be construed in favor of the Plaintiffs pursuant to *contra proferentem*.

IV. Even if a Valid Arbitration Agreement Exists, and the Agreement Intended Criminal Disputes to be Covered, This Case Should Still be Decided in Court.

IV.(A) Plaintiffs may not be compelled to arbitrate if doing so would cause them to waive rights under federal statutes.

Courts have held that arbitration agreements can be invalid when "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000); *see also Nesbitt v. FCNH, Inc.*, 811 F.3d 371 (10th Cir. 2016); *Sanchez v. Nitro-Lift Techs., L.L.C.*, 762 F.3d 1139, 1141 (10th Cir. 2014).

In *Sanchez v. Nitro-Lift Techs., L.L.C.*, three employees of an oil-rig service company sued, claiming they were due overtime wages under the Fair Labor Standards Act (FLSA) and the corresponding state law. *Sanchez*, 762 F.3d at 1141. In analyzing whether the employees' claims were included in the scope of the arbitration clause of their agreement, the court followed the three-step analysis required by the Tenth Circuit: first, the arbitration clause should be classified as broad or narrow. *Id.* at 1146 (quoting *Cummings v. FedEx Ground Package System, Inc.*, 404 F.3d 1258 (10th Cir. 2005)). Second, if the clause is found to be narrow, the disputed issue is classified as either facially within the purview of the clause or collateral to it. *Id.* Third, if the arbitration clause is narrow, a collateral matter is classified as outside the scope of the agreement. *Id.* But if the clause is broad, even a collateral matter is classified as within the scope of the agreement due to the presumption of arbitrability that arises. *Id.* The court in *Sanchez* found the clause at issue was broad and thus, even though aspects of the agreement were

ambiguous, the employees were FLSA claims were covered by the agreement due to the presumption of arbitrability. *Id.* at 1148.

But the court ultimately did not compel the arbitration. *Id.* at 1151. The district court had not, in its initial determination, examined the effect of the cost-shifting clause that the arbitration agreement contained. *Id.* at 1150. As such, the Tenth Circuit court had no way to determine whether there could be effective vindication of the employees' rights under the FLSA given the cost-shifting clause. *Id.* Consequently, the circuit court remanded the case for further proceedings. *Id.* The court thus left open the possibility that the arbitration agreement could be found to be invalid despite its broad scope.

Similarly, the Tenth Circuit has declined to compel arbitration in another case where federal statutory rights were at issue. *Nesbitt*, 811 F.3d at 378–79. In that case, Ms. Nesbitt claimed that she was forced to give massages without pay at the school for massage therapy at which she was enrolled, constituting a violation of the FLSA. *Id.* at 373. The court in *Nesbitt* noted the Supreme Court's "willingness to invalidate, on 'public policy' grounds, arbitration agreements that 'operat[e] . . . as a prospective waiver of a party's right to pursue statutory remedies.'" *Id.* at 377 (quoting *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2307). Because the financial burden of pursuing her claim through arbitration was unclear, the court found the potential risk of Ms. Nesbitt not being able to vindicate her claims under the FLSA impermissible. *Id.* at 378–79. The court was unpersuaded by arguments that an arbitrator could shift the costs associated with arbitration, thus relieving Ms. Nesbitt of some of the financial burden of pursuing her claim. *Id.* The speculative nature of the argument was not enough to sway the court.

Defendants argue that the breadth of the CAA should be interpreted in line with the decision in *United Steelworkers of Am., v. Warriors & Gulf Navigation Co*., 363 U.S. 574 (1960). Again, Defendants approach is that of a dispute between parties when neither party is in breach of the contract. Justice Douglas, in the *U.S. Steelworkers* case, noted "[f]or arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Id*. at 1353. Obviously, no matter how broad Wells Fargo wants the Court to interpret the CAA, it can never extend to the breadth of agreeing to criminal actions to which Plaintiffs have never agreed to submit to an arbitration proceeding.

Here, the plaintiffs are at risk of being unable to vindicate their rights under federal statute, preempting the arbitrations being requested by Defendants. If Wells Fargo customers are compelled to arbitrate, the financial burden, as well as the ability to engage in over 1,500,000 separate arbitration cases (the exact number is still being determined) would result in thousands of inconsistent decisions, in all fifty states. Conducting that many separate hearings is a burden on society in general and doing so could be such that they will be forced to forego pursuing their claims. Under Supreme Court precedent, these are sufficient grounds for invalidation of an arbitration agreement. *Am. Express*, 133 S. Ct. at 2310.

IV(B). Enforcement of Arbitration Provision Will Cause Disparate Impact

Low income individuals will not be able to pay the necessary costs of hiring an expert to testify concerning damages caused by harming credit score. Until recently, individuals weren't even allowed access to their FICO scores, which financial institutions would use to determine

credit worthiness. *See* Exhibit J Affidavit of Al Bingham. Whereas, in a class action setting, Plaintiffs would be able to have expert witnesses to bolster their case. Conversely, enforcing arbitration will have a disparate impact upon lower income individuals who will be unable to hire expert witnesses to assist these individuals in ascertaining their true damages.

IV(C). The New Accounts Are Not Governed by Prior Contract

As is common practice for the financial industry, each new account opened with Wells Fargo is governed by a new account agreement. Defendants Motion to Compel Arbitration p. xliv-xlvi. A checking account could not be expected to govern a new savings account. It is illogical for consumers to claim that the interest rates required on their savings account be governed by a unilaterally opened a money market account the customer decided to open. Each account opened, whether legitimate or not, must be governed by its own account agreement. This is common industry practice, and has been the practice of Wells Fargo according to its own admission. It is unjust and incomprehensible for Wells Fargo to claim that a new account is governed by a prior account agreement.

Even if the new accounts had an arbitration agreement, there is no valid contract governing the account. As mentioned previously, the prior account agreements would only govern those accounts and a new contract was never formed. There was no meeting of the minds, as the consumers were surprised by these actions. There was no consideration exchanged because this was a unilateral movement by one side of the party. A basic understanding of contracts underlies that a party cannot be bound if he did not agree to the contract and there was no consideration exchanged.

IV(D) Defendant's Actions Have Waived the Right to Demand Arbitration

Arbitration provisions may be waived by either party. *See e.g. Am. Sugar Ref. Co. v. The Anaconda*, 138 F.2d 765, 767 (5th Cir. 1943). In order to prove waiver of the right to arbitrate, the party seeking to prove waiver must demonstrate three things: (1) knowledge of existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to party opposing arbitration resulting from such inconsistent acts. *Fisher v A.G. Becker Paribas Incorporation*, 791 F2d 691 (CA9 1986).

Wells Fargo has waived the right to arbitration through their actions in this case because its actions have met all three of the prongs required by *Fisher*.

First, Wells Fargo, as drafting the agreement can be presumed to know the arbitration provision existed.

Second, Wells Fargo acted inconsistent with the right by violating the provisions of the arbitration agreement. The arbitration agreement states that parties *shall* arbitrate any dispute between them. Wells Fargo sent emails to clients stating that there were disputes in the form of account fees etc., and unilaterally acted to find a solution to the problem outside of the realm of arbitration. Defendant has acknowledged through sworn testimony before the United States Congress that accounts were opened up without customer authorization and that Defendant has refunded customers the amounts charged. On or around October 12, Wells Fargo emailed clients informing them that "We have provided full refunds to customers we have already identified and we're broadening our scope of work to find customers we may have missed. If we have any doubt about whether one of your accounts was authorized, and any fees were incurred on that account, we will contact you and refund fees." (Exhibit K- Email from Wells Fargo)

Third, prejudice to the Plaintiff would result from Wells Fargo's actions. Wells Fargo has aptly stated "as a party cannot rely on the contract when it works to their advantage, and repudiate it when it works to their disadvantage." Motion to Compel Arbitration p. iii. However, that is exactly what Wells Fargo has done in this case because it has circumvented the arbitration mandate only when it is conveniences them. It is patently unfair for Wells Fargo to work through means outside of arbitration when it is beneficial to them but demand arbitration when it benefits them.

As noted in *Licocci v. Cardinal Associates, Inc*, 492 N.E.2d 48, 52 "a party first guilty of a material breach of contract may not maintain an action against the other party or seek to enforce the contract against the other party should that party subsequently breach the contract." Li*cocci v. Cardinal Associates, Inc.*, 492 N.E.2d 48 (1 Dist. 1986) (citing *Lawrence v. Cain*, 144 Ind.App. 210, 245 N.E.2d 663 (1969); *Records v. Smith*, 72 Ind.App. 618, 126 N.E. 335 (1920); *Loudenback Fertilizer Co. v. Tennessee Phosphate Company*, 121 F. 298 (6th Cir. 1903). In the present matter, Wells Fargo committed the first material breach of contract by opening up fraudulent accounts. Defendant is therefore barred from seeking to enforce terms of the contract, i.e. Arbitration Agreement, against Plaintiffs, even if Plaintiffs have subsequently breached the contract by not using arbitration.

Simply put, Class Members will be prejudiced if Wells Fargo is allowed to circumvent arbitration provisions when it is convenient to them and demand arbitration when it is beneficial to them. Defendant fully aware of the arbitration provision did not seek arbitration in order to correct a "dispute", as required under the same line of thought espoused by the Defendant. In lieu of opening thousands, if not millions, of arbitrations to refund fees, which were subject to a "dispute", Defendant rushed to make good on public relations, Defendant ignored the mandatory

arbitration provision when it would be cheaper to circumvent the requirement and unilaterally resolve the problem. Now, Wells Fargo attempts to force arbitration against a Class Action lawsuit, when it would be more convenient for them.

IV(E) Class Members Are Excused From Performance

Under contract law, a breaching party cannot breach the contract, and then turn around and seek protection of the contract to its benefit against the non-breaching party. *See Island Peak Ranch, LLC, v. FIIK Inv. & Holdings, Inc.*, 2008 WL 2673925.

Class Members in this matter, did not breach the contract. Class Members voluntarily entered into agreements with Wells Fargo and agreed to be bound to the terms associated with that specific account. Class Members did not breach their end of the contract, and thus should not be forced into arbitration.

IV(F) Wells Fargo's History of Fraud Requires Court Review

Even if the Court rejects all of the arguments above, the Court should still allow this case to move forward. Wells Fargo has a history of forging documents, faking signatures, and other fraudulent activity. *See* Exhibit E and Exhibit G. Several accounts, to which Wells Fargo admitted under oath to congress, show that Wells Fargo employees forged customer signatures to open a new account. This entire case is about Wells Fargo opening fraudulent accounts through illegal and unscrupulous means. How then, can the Court or the parties trust that despite millions of accounts being opened illegally, that Wells Fargo is being honest when it claims that the accounts opened had arbitration agreements, or that it has fully refunded the ill-gotten fees, or that Wells Fargo has identified every party it has defrauded? Wells Fargo has repeatedly

misrepresented to clients, investors, and the government, material facts. The case should go on until Wells Fargo can produce the original documents signed by the clients.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit, that this Court deny Defendants Motion to Compel Arbitration, and Order that any stay based upon the issue of Arbitration, be hereby removed, and the case proceed with full discovery. The specific information regarding the 22 named individuals is irrelevant to the motion, as the relevant issues have been addressed, briefed, and there is no just reason for delay.

DATED this 23rd day of December, 2016.

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